OPINION OF THE COURT ON MOTIONS.

In this cause, on January 6, 1956, the Court, after hearing arguments of counsel on motions for new trial, announced the following ruling:

The Court: Well, gentlemen, of course juries arrive at their verdicts in many and devious ways. It is not required in the Federal Court that the Judge approve a verdict as under the State law a State Judge is required to do. Under our State practice the trial Judge is what we refer to as the thirteenth juror. I am correct about that, I think, Mr. Porter.

Mr. Porter: Yes, sir.

The Court: That used to be the law, and I am sure it still is.

This Court does not approve of every jury verdict rendered in this Court, but, as I say, that is more or less beside the question. I do think juries do substantial justice in a vast majority of the cases. But the jury system is not on trial here.

The Court, of course, has no information as to what went on in the jury room in this case, or what the basis was for arriving at the two verdicts the jury rendered.

The jury's verdict with respect to compensatory damages is not in the Court's opinion inconsistent on its face, as plaintiff's counsel seems to suggest. Nor is the jury's verdict on the exemplary damage count inconsistent on its face.

The Court can't say, Mr. Murray, either verdict of the jury on the two counts submitted to it in this case show on their face an abuse of the jury's power. The Court cannot say that there is no basis in the record for the verdicts rendered. And I believe the Court still has the facts of the case pretty well in mind.

The plaintiff's motion is in all things overruled.

You are saying, Mr. Murray, as I understand you, that there is an obligation on the Court in this case to grant a new trial—or rather, that there is a positive duty on the Court to order a new trial, and that it is not a matter concerning which the Court has discretion. Well, the Court rules, then, so there will be no mistake about it, that as a matter of law this plaintiff is not entitled to a new trial, and that if it is a discretionary matter, the Court exercises its discretion to overrule the motion, if you get what I mean.

All right, get up an order——

Mr. Murray: I am not clear what you mean, Judge; I did not catch——

The Court: I said you are saying——

Mr. Murray: I understood what you said my contention was, but the last remark there——

The Court: I say if this is a discretionary matter for the Court, the Court exercises its discretion in overruling the motion. Generally speaking the Court has some discretion in dealing with motions for new trial, and you have put this up to the Court as being a matter under which there is a positive obligation on the Court——

Mr. Murray: As a matter of law there is.

The Court: As a matter of law——

Mr. Murray: Yes, sir.

The Court: ——To grant you a new trial. And I am simply saying that as a matter of law you are not entitled to the relief you seek here, nor are you entitled to have the Court in its discretion grant a new trial.

Mr. Murray: Then the result of it is both motions are overruled, then.

The Court: Well, with respect to Mr. Porter's motion, the Court thinks the case was properly submitted to the jury, and that it was a question for the jury, and the jury's verdict settled the matter.

Mr. Porter: Yes, sir.

Mr. Murray: Thank you, Judge.

(Discussion.)

Mr. Murray: You did say both motions are overruled?
The Court: Yes, I did say both motions are overruled.
Mr. Murray: Plaintiff's and defendant's?
The Court: Yes, sir.
Mr. Murray: That is what I heard.

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Causes Argued and Submitted.

December 10, 1956—Before: Allen, Stephens and Miller, Circuit Judges.

These causes are argued by Charles V. Garnett for V. J. Devine and by John S. Porter for James S. Patteson, Jr., and are submitted to the court.

Judgment.

No. 12,877.

(Filed March 29, 1957.)

Appeal from the United States District Court for the Western District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court as to compensatory damages is set aside and a new trial is ordered upon that issue only. The judgment in all other respects is affirmed.

Judgment.

No. 12,878.

(Filed March 29, 1957.)

Appeal from the United States District Court for the Western District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court as to compensatory damages is set aside and a new trial is ordered upon that issue only. The judgment in all other respects is affirmed.

Opinion.

(Filed March 29, 1957.)

No. 12877-78.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Dr. V. J. Devine, Appellant and Cross-Appellee, v. James S. Patteson, Jr., Appellee and Cross-Appellant.	Appeal from the District Court of the United States for the Western District of Tennessee, Western Division.

Decided March 29, 1957.

Before Allen, Stephens* and Miller, Circuit Judges.

Allen, Circuit Judge. These appeals arise out of a complaint filed by Dr. V. J. Devine, plaintiff-appellant and

* Albert Lee Stephens of the Ninth Circuit.

cross-appellee, hereinafter called plaintiff, against James S. Patteson, Jr., defendant-appellee and cross-appellant, hereinafter called defendant, praying for damages for malicious prosecution. Plaintiff and William F. Snakard had been indicted February 16, 1954, for use of the mails in interstate transportation and use of instruments of transportation and communication in interstate commerce in an alleged conspiracy to defraud defendant and others in violation of Title 18 U. S. C., Section 371, Section 1341, and 15 U. S. C., Section 77 q (a) (1) and 77 e (a). The transactions covered by the indictment dealt with negotiations and agreements as to oil properties in Texas and as to a gasoline plant in Illinois. They involved witnesses and events in three states. The trial consumed almost two weeks. Plaintiff and Snakard were acquitted. Later plaintiff filed this action for damages against defendant, who had been prosecuting witness in the indictment.

The complaint averred that defendant maliciously, intentionally, and without just cause stated to the United States District Attorney that plaintiff had violated certain laws of the United States. At the trial of the malicious prosecution case plaintiff testified that the actual expense to which he was personally subjected in contesting the prosecution, consisting mainly of attorneys' fees and traveling expenses, amounted to over $19,000. This was not disputed. Defendant did not take the stand and no evidence was introduced to the contrary. The jury returned a verdict for plaintiff, allowing compensatory damages in the sum of $500.00 and punitive damages in the sum of $1.00.

The complicated indictment contained 8 counts, all based upon transactions alleged to be fraudulent, and charged numerous overt acts and other transactions which need not be set forth. Snakard, plaintiff, and others unknown, hereinafter called the Devine group, were charged with having misrepresented in 1950 and 1951, in pursuance of an

unlawful conspiracy, their ownership of certain assets which were proposed by the Devine group to be transferred to a joint venture for the operation of the mutual benefit of the Devine group and defendant and others, hereinafter called the Patteson group.

The evidence in the instant case was in conflict upon the principal claims of misrepresentation. We do not discuss them because the jury found for plaintiff and necessarily found that the misrepresentations alleged had not been made and the fraudulent acts charged had not been performed.

Plaintiff's appeal attacks only the amount of the verdict. He contends that, as the jury found defendant liable for malicious prosecution, it was required to consider the elements of damage shown by the uncontradicted testimony as to the extensive legal and traveling expenses incurred in the criminal prosecution. Plaintiff contends that the jury's failure to consider the uncontradicted evidence is so inconsistent with its verdict on liability as to require reversal and a new trial upon that feature of the case as a matter of law.

Defendant's cross-appeal is based principally upon the ground that the returning by the grand jury of an indictment against plaintiff and Snakard constituted prima facie evidence of probable cause, which was in no way rebutted in the instant trial; that there was no evidence from which the jury could rightly conclude that the indictment was procured by fraud, false testimony, concealment of material facts, malice, lack of good faith, or other improper contrivance on the part of defendant; and that the motion for directed verdict or for judgment non obstante should have been sustained. If this contention is correct, we do not reach the question of damages and therefore we first consider whether the District Court erred in submitting the issue of probable cause to the jury. The existence of prob-

able cause is in general a mixed question of law and fact. Cf. **F. W. Woolworth Company v. Gustine Connors**, 142 Tenn. 678. The "'honest reasonable belief of the party commencing the prosecution'" is a material element in the determination of probable cause. **F. W. Woolworth Company v. Gustine Connors**, supra. The advice of the District Attorney must be honestly sought in order that the defense of probable cause may be sustained. **Cooper v. Flemming**, 114 Tenn. 40; **Nashville Union Stockyards, Inc., v. Grissim**, 13 Tenn. App. 115.

The District Court charged the jury fully upon the applicable law of probable cause and no question is raised here as to the correctness of the charge. He instructed the jury that:

> "Where it appears that there was probable cause, that is, reasonable cause to believe the plaintiff had been guilty of the crimes with which he was charged, or any one of them, for the institution of the original criminal proceedings, then same would be an absolute defense in this action. . . .
>
> ". . . if you find from the proof that the defendant, at the time the prosecution herein was instituted, acted upon such state of facts known to him as would induce a belief in the mind of a prudent and discreet man that an offense had been committed by the plaintiff Devine, he would not be liable."

These instructions were certainly favorable to defendant. In view of these and other portions of the charge it is evident that the jury found that the defendant in pressing the criminal charge did not act in good faith, nor under an "honest" belief in plaintiff's guilt. If there was evidence to support such a finding the District Court was required to submit the question to the jury.

Defendant stresses the fact that prior to the indictment the United States postal inspector made an extensive in-

vestigation in locations in Arkansas, Tennessee, and various cities of Texas, interviewing numerous persons before the indictment was returned. The Securities and Exchange Commission and the FBI at certain points conferred with the postal department. However, it was shown without contradiction that, while the alleged fraudulent acts and representations of the Devine group took place around December, 1950, and January, 1951, early in that year Snakard was removed as trustee of Padre by agreement between the parties. Around March 20, 1951, the Patteson group was given full authority to control future Padre operations, and the Devine group turned over to the Patteson group a 29% interest in Padre. In May, 1951, defendant's control of Padre was extended. It was not shown in the instant case that the minutes of the meetings held in connection with these transactions suggest that plaintiff and Snakard had conspired to defraud the investors.

In July, 1951, defendant and Magnussen held Snakard in defendant's hotel room at Brownwood, Texas, under threats of arrest and prosecution for the purpose of securing a further 15% from the Devine group. It is not denied that about this time defendant told plaintiff that if plaintiff or his group did not turn over the 15% interest plaintiff would be prosecuted and defendant would see that it got "in every paper in the United States." In defendant's testimony given in the criminal case, introduced in the instant trial, defendant admitted that he forced Snakard to call his brother and plaintiff and tell them that unless they reduced their interest to 1% "we would prosecute him for fraud." Defendant said that "We certainly told him that if he did not put these telephone calls through, we were going to start prosecution . . . we just told them that either they were going to reduce it [their interest] or we would start prosecution." He said, "My group . . . got Bill Snakard down in Brownwood, Texas, and extracted

from him his fifteen per cent." The minutes of July 17, 1951, show that the 15% interest was taken from the Devine group. Defendant, who on June 1, 1951, had secured a mortgage of $45,000 covering all the Padre properties, later foreclosed the mortgage and became sole owner. Padre's financial report of February 29, 1952, shows an ownership equity in Padre of $345,809.96. This testimony was not contradicted. Defendant did not take the stand in the malicious prosecution case.

Since defendant for a considerable period, as shown by the uncontradicted testimony, accepted the activities of plaintiff and Snakard in Padre's affairs without any claim of fraud and later extorted from Snakard and plaintiff practically their entire interest by threats of prosecution, the inference of good faith and probable cause arising from the indictment was rebutted. The question whether defendant acted in good faith in pressing the indictment in 1954, so long after the civil liability of plaintiff, if any, at least in large degree, had been settled, became a question of fact. Under Tennessee law defendant's failure to testify in the malicious prosecution case warranted an inference of bad faith and want of probable cause. **Bankhead v. Hall**, 238 S. W. (2d) 522, 527, 34 Tenn. App. 412. The District Court did not err in submitting this issue to the jury.

Defendant raises a second question which we deem it unnecessary to discuss in detail. He maintains that if is shown by undisputed proof that the substance of the charges in the indictment is true and therefore contends that the judgment against him should be reversed under the doctrine of **Bry-Block Mercantile Company, Inc., v. Proctor**, 10 Tenn. App. 651. However, the premise of this contention is lacking. The proof claimed to establish the substance of the charges in the indictment was not undisputed. The material charges of the case were controverted

and the jury, in fact, found that they were not true. The cited decision has no application.

We conclude that defendant's cross-appeal has no merit.

As to plaintiff's appeal, in his contention that the verdict must be set aside for inadequacy of the amount awarded plaintiff relies upon a decision of this court, **Reisberg v. Walters**, 111 Fed. (2d) 595? We there held that the award of a jury in a personal injury case arising out of an automobile accident was grossly inadequate if it failed to consider essential elements of damages in an amount conceded to have been suffered, and demonstrated that the jury had failed to abide by the instruction of the court. The **Reisberg** decision reaffirmed the doctrine of **Pugh v. Bluff City Excursion Company**, 177 Fed. 399, 401 (C. A. 6), which held that in case of inadequacy of verdict such as here presented it was error of law to overrule a motion for new trial. Cf. **Miller v. Maryland Casualty Company**, 40 Fed. (2d) 463 (C. A. 2). In this case Judge Learned Hand, speaking for the court, declared that, while courts will rarely review an award for damages, orders refusing new trials because of the amount of the verdict have been reversed in cases where the jury did not attempt to appraise the plaintiff's loss at all and where the verdict was less than the amount of undisputed loss. Cf. **Spero-Nelson v. Brown**, 175 Fed. (2d) 86 (C. A. 6), in which the doctrine of the **Reisberg** case, supra, was specifically approved.

Defendant contends that since the testimony as to legal expense was given by plaintiff only the jury was authorized to disregard it. But it is uncontradicted that plaintiff made preliminary legal investigations in three states, employed numerous lawyers in all of these states, and vigorously contested the criminal prosecution lasting almost two weeks. These undisputed facts constitute evidence of expense in addition to plaintiff's statements.

Since the verdict was less than the amount of the loss shown and not disputed, the motion for new trial should have been granted. We see no essential difference between physical damage suffered in a personal injury case and professional and psychological damage suffered in the trial of a criminal case. While there was controversy as to defendant's liability, there was no controversy as to the necessity of plaintiff's incurring the expenses listed, nor as to the fact that they were actually incurred. The award of $500 was around 1/40 of the actual and specific damages proved and nothing was allowed for the undisputed injury shown to have been suffered by plaintiff in his professional reputation, standing, and loss of practice.

While in general the granting of a new trial is a matter of discretion with the court, it is not so when the verdict is inconsistent on its face. **Pugh v. Bluff City Excursion Company**, supra. The jury found plaintiff was entitled to recover. In view of the undisputed evidence as to expense caused by the wrongful prosecution it is evident that the jury did not comply with the instructions of the court.

As to punitive damages the award is peculiarly within the discretion of the jury. We cannot say that the discretion was abused, and we do not set aside the verdict of $1.00. **Davis v. Farris**, 1 Tenn. App. 144; **Hostettler v. Vaden**, 13 Tenn. App. 454, 123 A. L. R. 1130.

The District Court erred in not granting a new trial limited to the question of compensatory damages. Federal Rules of Civil Procedure, rule 59 (a), 28 U. S. C.; **Chesevski v. Strawbridge & Clothier**, 25 Fed. Supp. 325; Barron and Holtzoff, Federal Practice and Procedure, Vol. 3, § 1304, § 1307, which reads as follows:

> "If issues are framed for the jury and the issue as to which a new trial is required is separate from all other issues, and the error requiring a new trial

does not affect the determination of any other issue, the scope of the new trial may be limited to the single issue. Thus new trials have been limited to the issue of damages. . . ."

A majority of the court thinks it would be unjust to a plaintiff who has proved to the satisfaction of the jury that he was subjected to a malicious prosecution to have to retry the question, not only of damages, but also of liability. If the issues are as we think, separate and distinct, conceivably plaintiff might be compelled to pay a second very large amount for legal expenses in order to collect the amounts expended in the first suit. A majority of the court considers that the issue of damages here is entirely separate from other issues presented. If the issue of compensatory damages is retried defendant will have a second opportunity to contest the claimed legal and other expenses which in the instant case he did not contradict. This is not unjust to him nor does it in any way affect the question of liability. Whether plaintiff spent $500, $5,000, or $19,000 in fighting the indictment has no bearing upon whether defendant maliciously and without probable cause secured plaintiff's indictment. The amount of the expense has no probative connection with the issue of liability, hence the case may be retried singly.

We think this conclusion is in accord with the applicable law. While a new trial should cover the issue of liability as well as of damages if these issues are so interwoven as to be inseparable, we think this case does not call for the application of that rule. The majority of the cases cited in the dissenting opinion are personal injury cases. In this type of controversy obviously the imponderables arising from cases which present highly emotional features are omnipresent. In a number of the cases cited there was an issue, not only of negligence

but of contributory negligence. **Southern Railway Company v. Frank J. Madden**, 235 Fed. (2d) 198 (C. A. 4); **Bass v. Dehner**, 21 Fed. Supp. 567, affirmed 103 Fed. (2d) 28 (C. A. 10); **Grant & Company v. Tanner**, 170 Tenn. 451. The Fourth Circuit in **Southern Railway Company v. W. W. Neese**, 216 Fed. (2d) 772, held that the issues of damage and liability were separate and distinct. This case was reversed by the Supreme Court, 350 U. S. 77. However, in both decisions, that of the Circuit Court and that of the Supreme Court, the verdict as to liability was sustained.

In the **Madden** case, as to the issue of liability the Fourth Circuit found that prejudicial error existed in the admission of testimony and in the charge of the court. Quoting from and following an opinion by Chief Justice Rugg in **Simmons v. Fish**, 240 Mass. 563, the court held in effect that it was obvious in the **Madden** case that no jury had decided the issue of liability against the railway company on "justifiable grounds."

Here defendant's contention as to liability is that the undisputed facts demonstrated the existence of probable cause. This issue was correctly submitted to the jury, which found in favor of the plaintiff and the finding is supported by the record. Reversible error exists only in the amount of the verdict. **Chesevski v. Strawbridge & Clothier**, supra; **Dodson v. Baker**, 1 F. R. D. 368.

The judgment as to compensatory damages is set aside and a new trial is ordered upon that issue only. The judgment in all other respects is affirmed.

Miller, Circuit Judge, dissenting. I am in agreement with the statement in the majority opinion of the general rule that under certain conditions where the issue of damages is entirely separate from the issue of liability, a new trial may be granted limited to the issue of damages only. This Court has so held. **Thompson v.**

Camp, 167 F. (2d) 733, C. A. 6th. But as stated in that case, the court should proceed with caution, with a careful regard for the rights of both parties, and only in those cases where it is plain that the error which has crept into one element of the verdict did not in any way affect the determination of any other issue. The error in that case was an error in the instructions dealing with the question of damages and had no bearing on the issue of liability. In my opinion, the rule is not applicable to the present case.

It is, of course, true as stated in the majority opinion, that as an abstract question of law whether the plaintiff spent, $500, $5,000 or $19,000 in fighting the indictment has no bearing upon whether defendant maliciously and without probable cause secured plaintiff's indictment. This would be a complete answer to the issue here involved if the jury followed this principle of law in reaching its verdict. It seems to me that the jury not only refused to follow the law and the evidence on the question of damages, which is the basis of the ruling that a new trial should be granted, but also at the same time refused to follow this principle of law which requires that questions of liability and damage be independently determined. I do not think we can reasonably say with any degree of certainty that the jury refused to follow the law on the question of damages but did follow the law on the question of liability. Verdicts which are obviously compromise verdicts show rather conclusively that as a practical matter, and in disregard of the rule of law to the contrary, the questions of the amount of damages and determination of liability are closely interwoven. This appears to me to be such a case.

It seems clear to me that this was a compromise verdict, that most of the jurors in this case were not in favor of returning a verdict for the plaintiff, and would

not have agreed to a verdict for the plaintiff if it would result in awarding to him any substantial amount. If the jury had unanimously been in favor of a verdict for the plaintiff, the amount of the verdict would undoubtedly have been many times greater. The evidence to sustain such an amount was undisputed. There was no reason appearing in the record why as reasonable jurors they would not have followed the evidence on this issue if they were satisfied that the defendant wronged the plaintiff as claimed. To me, the obvious answer as to why the verdict was only $500 is not that they failed or refused to follow the evidence on the question of damages, but that most of the jurors were not satisfied that there should be a verdict in any amount against the defendant. With a few jurors strongly favoring a verdict in a substantial amount, and in order to reach a verdict and avoid a new trial those jurors opposed to a verdict for the plaintiff agreed to return a verdict for him if it was limited to a relatively small amount. This appears to me to be a more logical analysis of the verdict than to say that the twelve jurors were unanimously in favor of a verdict for the plaintiff, but arbitrarily refused to follow the law and evidence on the question of damages. In the present case it is at least probable that the questions of liability and the amount of damages were, as a practical matter, so closely interwoven that if a new trial is to be granted, it should be granted in its entirety and not limited to the question of damages only. **Schuerholz v. Roach**, 58 F. (2d) 32, 34, C. A. 4th, cert. denied, 287 U. S. 623; **Southern Railway Co. v. Madden**, 235 F. (2d) 198, 204 C. A. 4th. Unless it clearly appears that the issue of damages was distinct and separable from the issue of liability, a new trial on the issue of damages alone should not be granted. **Gasoline Products Co. v. Champlin Refining Co.**, 283 U. S. 494, 500; **Thompson v. Camp**, supra, 167 F. (2d) 733, 734, C. A. 6th.

The point is well illustrated by the case of **Bass v. Dehner,** 21 F. Supp. 567, where the Court granted a new trial because the damages were inadequate but refused to limit the new trial to the question of damages only. On the retrial the jury returned a verdict for the defendant. **Bass v. Dehner,** 103 F. (2d) 28, C. A. 10th, cert. denied, 308 U. S. 580, rehearing denied, 308 U. S. 635.

The question usually arises in tort actions, although it is not so restricted. **Gasoline Products Co. v. Champlin Refining Co.,** supra, 283 U. S. 494, 500. The present action is a tort action. See also: **W. T. Grant Co. v. Tanner,** 170 Tenn. 451, 95 S. W. (2d) 926; **Simmonds v. Fish,** 210 Mass. 563, 97 N. E. 102; **Leipert v. Honold,** 39 Cal. (2d) 462, 247 Pac. (2d) 324; **Johnson v. Sgourakis,** 20 N. J. Super. 77, 89 A. (2d) 273; **Parker v. Allen,** 171 Kan. 360, 233 Pac. (2d) 514; **Flaugh v. Egan Chevrolet, Inc.,** 202 Minn. 615, 279 N. W. 582; **Reay v. Beasley,** 49 Arizona 362, 66 Pac. (2d) 1043; **Murray v. Krenz,** 94 Conn. 503, 109 A. 859, 861.

I do not believe the ruling in **Southern Railway Company v. W. W. Neese,** 216 F. (2d) 772, C. A. 4th, cited in the majority opinion, should be relied upon. As noted in the majority opinion this ruling of the Court of Appeals was subsequently reversed by the Supreme Court, 350 U. S. 77. Also, the same Court of Appeals later held that where it is clear that an inadequate verdict is a compromise verdict, the new trial should not be limited to the question of damages alone. Southern Railway **Company v. Madden,** supra, 235 F. (2d) 198, 204, C. A. 4th.

I think the statement of the Supreme Court in **Dimick v. Schiedt,** 293 U. S. 474, 486, is directly applicable to this case and states the rule which we should follow. The Court said: "Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should

not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages.'" (Emphasis added.) As pointed out in the majority opinion, this court has in two cases held that a new trial should have been granted by reason of inadequacy of damages. **Pugh v. Bluff City Excursion Co.**, 177 F. 399, C. A. 6th; **Reisberg v. Walters**, 111 F. (2d) 595, C. A. 6th. Although the question is not discussed in the opinions, in neither of the cases was the new trial limited to the question of damages. In the **Reisberg** case we referred to **Dimick v. Schiedt**, supra, 293 U. S. 474, as being one of the cases pointing the way to our ruling in that case, and quoted in the opinion the foregoing statement of the Supreme Court.

Nos. 12,877, 12,878.

In the
UNITED STATES COURT OF APPEALS,
For the Sixth Circuit.

Dr. V. J. Devine,
Appellant and Cross-Appellee,

vs.

James S. Patteson, Jr.,
Appellee and Cross-Appellant.

Petition to Rehear.

(Filed April 12, 1957.)

To the Honorable Judges of the United States Court of Appeals for the Sixth Circuit:

MAY IT PLEASE THE COURT:

Comes the appellee and cross-appellant James S. Patteson, Jr., and petitions the Court to grant him a rehearing in this cause upon the grounds stated herein.

This cause was decided on March 29, 1957, at which time the judgment of the District Court on a jury verdict as to compensatory damages was set aside and a new trial ordered upon that issue only. The judgment of the District Court rendered on the jury verdict was otherwise affirmed.

The Jury Verdict for Compensatory Damages Is Not Inconsistent With the Facts of the Case as a Matter of Law and Is Not a Separate and Distinct Issue.

This case originated in the State of Tennessee and the decisions of that state's courts govern the substantive rights of the parties. Under these decisions the verdict of the jury is not inconsistent as a matter of law with the facts of the case nor is the issue of compensatory damages separable from the issue of liability.

In the case of **Woodfolk v. Sweeper**, 21 Tenn. 88, decided by the Tennessee Supreme Court at the December Term, 1840, in an opinion by Mr. Justice Turley, the plaintiff sued for damages for false imprisonment. The plaintiff alleged that the defendant had wrongfully and illegally detained him in slavery for a period of approximately three years, during which time defendant compelled plaintiff to labor for him as a slave, and that plaintiff was compelled to expend large sums in prosecuting suits for the recovery of his freedom, to-wit, attorneys' fees, witness fees, and other necessary expenses. The evidence sustained these allegations and the case was submitted to a jury and decided in favor of the plaintiff. On appeal the defendant assigned as error the charge of the Trial Court that the plaintiff was **entitled** to recover as damages the value of his services for the time he was wrongfully imprisoned, the necessary expenses incurred in recovering his freedom and a reasonable allowance for his attorney fees. Upon this assignment the Court held:

"* * * The error consists in the use of the word 'entitled,' which imports a legal right; and leaves the

jury no discretion as to the amount of damages, but really makes it a matter of account, which, we have just said, it cannot be. It must stand, like all other cases of like kind, subject, for the amount of damages, to the discretion of the jury. It was proper in evidence to show the time plaintiff was falsely imprisoned, the value of his labor, the expenses he had been put to in obtaining his freedom, etc. And the judge should have said to the jury that these were legitimate things to be considered of by them in assessing the damages. * * * Inasmuch as proof upon these points could have been heard in aggravation of damages, and the jury might have given the whole, the court determined it should be done upon the case agreed, and judgment was given accordingly. But this is no determination that a jury is bound to make a full allowance. This defendant may introduce circumstances of mitigation, viz., his ignorance of the plaintiff's right to freedom, his uniform kindness to him in sickness and in health, and many other things which the jury would have the right to take into consideration, and would often prevent their giving what might otherwise be considered the full measure of justice. The case will be reversed and remanded for a new trial."

In the case of **Daniel v. Giles**, 108 Tenn. 242, plaintiff sued for assault and battery and recovered a judgment. Defendant appealed. The issue was whether or not circumstances could be shown in mitigation of damages. The Court said:

"The Court then proceeds to instruct the jury that if they find for the plaintiff under the charge, he would be entitled to recover for mental and physical suffering, loss of time, medical expenses, etc. The Court failed to instruct the jury that any insulting language or provocation offered by the plaintiff as

> the time of the assault should be considered in mitigation of damages. On the contrary, the consideration of the provocation for any purpose is entirely excluded by the Court in his hypothetical statement of facts, and the jury were instructed that unless the proof showed the defendant acted in self-defense at the time of the assault, the plaintiff would be entitled to recover just such damages as he had sustained. This is an affirmative error, for which the judgment must be reversed and the cause remanded" (p. 244).

To the same effect are the cases of **Jacaway v. Dula**, 15 Tenn. 82, and **Chambers v. Porter**, 45 Tenn. 273-280.

In the case of **Deaderick v. Smith**, 33 Tenn. App. 151, 230 S. W. 2d 406, the action was for false imprisonment which is closely akin to malicious prosecution and there was a judgment for the plaintiff alleged to be excessive. The Court said:

> "It is insisted that the amounts of the verdicts are excessive. In cases of this kind the question of the amount of the verdict is peculiarly a question for the jury. There is no method of calculating the extent of the damages in dollars and cents and the amount of the recovery should be left to the discretion of a jury subject to the approval of the trial judge, unless this amount is exorbitant and the result of passion, prejudice, or caprice on the part of the jury. Such does not appear in this case" (p. 159).

It follows from the foregoing that in intentional harm cases in the State of Tennessee the issue of liability is not separate and distinct from the issue of damages either compensatory or punitive.

By reason of the foregoing authorities the jury in the case at bar had the right and duty to consider all of the circumstances in determining both liability and damages.

The verdict was not as a matter of law inconsistent with the facts contained in the record nor was the amount of this verdict for compensatory damages separable from the facts creating liability.

In the case of **Bigelow v. Sickles** (Wis. 1891), 49 N. W. 106, plaintiff sued for malicious prosecution and in that case the Supreme Court of Wisconsin held that it was proper to introduce evidence of the plaintiff's guilt "both in proof of probable cause and in mitigation of damages and without proof that he was informed of the testimony before he made the charge."

In the case of **Wallner v. Fidelity & Deposit Co.** (Wis., 1948), 33 N. W. 2d 215, 10 A. L. R. 2d 475, plaintiff sued for false imprisonment. The facts were that an officer admittedly arrested the wrong person on a warrant. The Court said:

> "An officer's mistake under such circumstances, while not a justification, **may reduce damages** and show want of malice." (Emphasis ours.)

To the same effect are the cases of **Schnaufer v. Price**, 124 S. W. 2d 940 (1939), and **Glover v. Heyward**, 94 N. E. 878 (S. C., 1918).

Malice of the Most Express Character Will Not Establish the Absence of Proper Cause.

This Honorable Court has in its opinion pointed up very forcefully the evidence of malice shown against the defendant and has inferred from this evidence the absence of probable cause. Under the controlling authorities in the State of Tennessee this inference cannot be drawn from evidence of malice.

The indictment in the case at bar evidenced probable cause just as the act of the Trial Judge in granting the

injunction evidenced probable cause in the case of **Memphis Gayoso Gas Co. v. Williamson**, 56 Tenn. 314, where the Supreme Court of Tennessee in this connection said:

> " * * * Nothing is said in the charge as to the weight to be given, on the question of probable cause, to the fact Judge Trigg, after argument, entertained jurisdiction of the case and granted the injunction. It is clear that this fact constituted the starting point in the investigation of the question of probable cause. As a matter of law, it was sufficient evidence of probable cause until overturned by evidence of fraud or improper conduct in procuring the decision to be made. The burden was on the plaintiff to make proof to overcome this prima facie evidence furnished by the action of the judge."

There is abundant proof from which the jury could have found malice but there is no proof from which the jury could have found that the defendant testified falsely before the Grand Jury, was not a truthful witness at any time, procured others to testify falsely before the Grand Jury or did anything whatsoever to cause the Grand Jury to act oppressively against the plaintiff. The problems of counsel for the defendant are not created in any sense by the failure of the defendant to either speak or testify openly, candidly and truthfully but on the contrary our problems are due largely to the fact that the defendant either talked or testified too much as to matters against his own interest.

In **Union Stockyards, Inc., v. Grissim**, 13 Tenn. App. 115, the Tennessee Court of Appeals said:

> " * * * Malice, alone, however great, is insufficient. Want of probable cause cannot be inferred from malice, however great such malice may be, even 'the most express malice.' 38 C. J. 401-2; 1 Cooley on Torts, 3 Ed. 337; Kendrick v. Cypert, 10 Hump. 294" (p. 127).

To the same effect are the cases of **Kendrick v. Cypert**, 29 Tenn. 290, and **Wheeler v. Nesbit**, 16 Law Ed. 765.

In the case of **Wheeler v. Nesbit**, supra, the Court said:

> "* * * Malice, alone, however, is not sufficient to sustain the action, because a person actuated by the plainest malice may, nevertheless, prefer a well founded accusation, and have a justifiable reason for the prosecution of the charge. * * *
>
> "It is true, as before remarked, that want of probable cause is evidence of malice for the consideration of the jury; but the converse of the proposition cannot be sustained" (pp. 768-769).

The burden is upon the plaintiff to show the absence of probable cause. The indictment was prima facie evidence of probable cause and became conclusive unless it was shown to have resulted from some false swearing or other improper conduct of the defendant **before the Grand Jury.** This Honorable Court has reasoned that the evidence of reprehensible conduct on the part of the defendant which occurred in 1951 or **three years before the indictment,** destroyed the presumption that resulted from proof of the indictment.

We most respectfully insist that the starting point of this investigation as stated by the Supreme Court of Tennessee in **Memphis Gayoso Gas Co. v. Williamson,** supra, and by all other authorities that have considered the question was the indictment itself.

The only evidence in this record that bears on the defendant's activities in connection with the indictment and his appearance before the Grand Jury is the defendant's answers to interrogatories which were read into evidence by the plaintiff and which negative any fraud or false swearing on the part of the defendant (Record 119-b through 122-b).

Wholly aside from the presumption arising from proof of the indictment is the evidence which came from the plaintiff himself showing that he and his associate Snakard were indisputably guilty of certain acts of fraud in December, 1950 and January and February, 1951. This Honorable Court did not discuss these acts of fraud but held in effect that they were obviated or excused by the acts of the defendant in dealing with the plaintiff after such fraud was committed and by the evidence of defendant's malice. The opinion of the Court supports this holding by pointing to the fact that the defendant failed to testify.

We concede that plaintiff's testimony if believed would show malice on the part of the defendant, but there was nothing in his testimony that attempted to deal with the evidence presented to the Grand Jury or to explain his own fraudulent acts. Neither laches nor condonation by the defendant would relieve the plaintiff of the effect of his fraudulent acts and the defendant's malice would not supply proof of the absence of probable cause in aid of plaintiff's case.

In this situation this Court has found on the authority of **Bankhead v. Hall**, 238 S. W. 2d 522, 34 Tenn. App. 412, that the defendant's failure to testify warranted an inference of bad faith and **want of probable cause.** We heartily agree that the failure of the defendant to testify warranted an inference of malice because there was prima facie evidence of malice already in the record, but we earnestly and respectfully disagree with the conclusion that the failure of the defendant to testify furnished substantive proof of the absence of probable cause. The effect of defendant's failure to testify is clearly shown by the case of **National Life & Acc. Insurance Co. v. Eddings**, 188 Tenn. 512 (1949), 221 S. W. 2d 695. In that case the Supreme Court had this exact question before it although not in a malicious prosecution case. On this point the Court said:

"'The Court of Appeals is of the opinion that the inference arising from the failure of a party to produce available witnesses or from his failure to cooperate with his adversary in bringing pertinent facts before the Court, does not amount to substantive proof which can be substituted for a fact required to make out his adversary's case. To this we agree. The inference to be drawn from such conduct may well be a persuasive factor in the process of weighing and interpreting the testimony offered by the party who can produce evidence and fails to do so, but it cannot be treated as affirmative evidence of a fact otherwise unproved. Logic and precedent combine to establish this conclusion. 'The extent of a party's right to invoke his opponent's failure to call an available witness is merely to impair the value of the opponent's proofs and to give greater credence to the positive evidence of the party on any issue in which it is shown that the witness might have had knowledege.' 31 C. J. S., Evidence, sec. 156, p. 860. See also Milio v. Railway Motor Trucking Co., 257 App. Div. 640, 15 N. Y. S. (2d) 73.

"'The presumption may be used to throw light on evidence already in; not to make evidence. . . . No presumption or inference from the non-production of evidence is potent enough to supply independent evidence of a fact which is wholly unproved by other evidence.' Jones' Commentaries on Evidence, sec. 97.

"A full annotation upon the subject appears in 70 A. L. R. 1326-1330. The cases there cited and the reason supporting them justify the adoption of the following statement quoted from American Jurisprudence and relied on by the Court of Appeals in this case:

"'It may be fairly implied from the cases that the presumption or inference arising from the failure of a party to produce available witnesses or evidence

or to testify does not amount to substantive proof and cannot take the place of proof of a fact necessary to the other party's case . . . .'" (pp. 520-521).

The case of **Bankhead v. Hall**, supra, is not inconsistent with the holding of the Supreme Court in the case of **National Life & Acc. Insurance Co. v. Eddings**, supra, and shows clearly that such failure to testify may be the basis for an inference in favor of evidence already in the record but cannot be construed as substantive evidence in support of plaintiff's case.

Conclusion.

The record discloses in this case that the jury was charged at 1:30 o'clock P. M. on December 6, 1955 (Record, 564). At the completion of the charge the jury remained out until 5:30 P. M. December 6, 1955, at which time it had failed to arrive at a verdict (Record 609). At that time the foreman of the jury advised the Court that the jury desired additional instructions (Record 610). On the morning of December 7, 1955 the foreman made a specific request for an additional charge on probable cause (Record 611 through 614). The Court then charged the jury anew by delivering his entire charge for the second time (Record 614 through 654). The jury then retired to consider further its verdict and returned to the court room at 12:25 P. M. December 7, 1955 (Record 657). That afternoon the jury again retired to further consider its verdict (Record 660) and finally returned its verdict late in the evening on December 7, 1955.

Evidence of the foregoing extensive deliberations on the part of the jury lends tremendous support to the well-reasoned dissenting opinion of Judge Miller. Under these circumstances we earnestly beseech the Court to re-examine the reasoning contained in Judge Miller's opinion particularly in the light of controlling Tennessee law which we failed to cite to the Court in our earlier brief.

We have diligently searched the authorities and we have failed to find a single malicious prosecution or false imprisonment case decided by either the Federal courts or by the appellate courts of the various states where a jury verdict was set aside and the cause remanded for assessment of damages only. These annotations which we have examined are as follows:

Excessiveness or Inadequacy of Damages for Malicious Prosecution, 35 A. L. R. 2d 308;

Propriety of Limiting to Issue of Damages Alone New Trial Granted on Ground of Inadequacy of Damages Awarded, 98 A. L. R. 941;

Propriety of Limiting to Damages Alone New Trial Granted on Ground of Inadequacy of Damages Awarded, 29 A. L. R. 2d 1199.

Appellee and cross-appellant respectfully prays that this Honorable Court grant him a rehearing; and

1. Affirm the Trial Court because the verdict is not as a matter of law inconsistent with the facts of the case; or

2. Remand the case for a new trial on all issues.

Respectfully submitted,

John S. Porter,
Attorney for Appellee and Cross-Appellant James S. Patteson, Jr.

I, John S. Porter, certify that this petition to rehear is not filed for purposes of delay.

This 10th day of April, 1957.

John S. Porter.

Order Denying Rehearing.

(Filed April 30, 1957.)

The petition for rehearing is denied. Judge Miller is of the opinion that the petition should be granted.